

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re)	
)	
SHERI LU TIFLATI,)	Case No. BKY 04-40651
)	
Debtor.)	
SHERI LU TIFLATI,)	
)	
Plaintiff,)	
)	Adversary No. 04-4150
vs.)	
)	
DIRECT LOANS and)	
GREAT LAKES EDUCATIONAL)	
LOAN SERVICE,)	
)	
Defendants.)	

NOTICE OF HEARING AND MOTION
OF THE UNITED STATES DEPARTMENT OF
EDUCATION (DIRECT LOANS) FOR RELIEF FROM JUDGMENT

1. The United States Department of Education (Direct Loans) by and through its undersigned attorneys, Thomas B. Heffelfinger, United States Attorney for the District of Minnesota and Roylene A. Champeaux, Assistant United States Attorney, moves the Court for the relief requested below and gives notice of hearing herewith.

2. The Court will hold a hearing on this motion at 10:30 a.m. on November 3, 2004, or as soon thereafter as counsel can be heard, in Courtroom 7 West, United States Bankruptcy Court, United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415.

3. Because this motion is being served by mail and filed at least 24 days before the hearing date, any response to this motion must be filed and delivered not later than October 27, 2004 which is seven days before the time set for the hearing (including Saturdays, Sundays and holidays), or filed and served by mail not later than October 22, 2004, which is ten days before the time set for the hearing (including Saturdays, Sundays and holidays) as provided by Loc. R. Bankr. P. (D. Minn.) 9006-1(b). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Fed. R. Bankr. P. 5005, and Loc. R. Bankr. P. (D. Minn.) 1070-1 and 5005-1. This is a core proceeding under 28 U.S.C. Section 157(b)(2)(I). The complaint commencing this adversary proceeding was filed May 10, 2004. The Court entered judgment for Plaintiff Sheri Lu Tiflati against Defendant United States Department of Education on September 3, 2004.

5. This motion arises under Fed. R. Bankr. P. 9024. This motion is filed under Fed. R. Bankr. P. 5005(a)(2), 7001, 7005, 7007 and 9013 and Loc. R. Bankr. P. (D. Minn.) 7007-1. Movant requests relief from the Judgment entered September 3, 2004.

6. Defendant United States Department of Education seeks relief from the judgment because plaintiff failed to properly serve defendant United States Department of Education with the Summons and Complaint pursuant to Fed. R. Bankr. P. 7004(b)(4) and (5).

7. Service was improper because plaintiff failed to serve the United States Department of Education, United States Attorney for the District of Minnesota and the Attorney General of the United States and instead served the Direct Loans, c/o United States Department of Education (hereinafter "ED") at P.O. Box 4222, Iowa City, Iowa 52244. Upon information and belief this address is not an ED address. See plaintiff's Certificate of Service filed May 17, 2004. See also, Affidavit of Roylene A. Champeaux attached hereto and incorporated herein as Exhibit A.

8. When plaintiff filed her application for default judgment, she served ED at the same address. See Plaintiff's Certificate of Service filed July 22, 2004.

9. As the plaintiff did not properly serve ED, ED was not made a party to the action and the Court is without jurisdiction to enter judgment against ED.

10. A separate memorandum of fact and law is submitted with this motion.

WHEREFORE the United States of America prays for the following relief:

1. That the Court vacate the Judgment in favor of the plaintiff and against the United States Department of Education filed September 3, 2004.

2. That the U.S. Department of Education have such other and further relief as may be just and equitable.

Dated: October 7, 2004

THOMAS B. HEFFELFINGER
United States Attorney

/e/ Roylene A. Champeaux
BY: ROYLENE A. CHAMPEAUX
Assistant United States Attorney
Attorney Reg. No. 154805
600 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5685

Attorneys for the United States
Department of Education

VERIFICATION

I, Roylene A. Champeaux, attorney for the moving party,
named in the foregoing Notice of Motion and Motion of the United
States of America to vacate judgment, declare under penalty of
perjury that the foregoing is true and correct according to the
best of my knowledge, information and belief.

Executed on: October 7, 2004 Signed: /e/ Roylene A. Champeaux
 ROYLENE A. CHAMPEAUX
 Assistant U.S. Attorney

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re)
)
SHERI LU TIFLATI,) Case No. BKY 04-40651
)
Debtor.)

SHERI LU TIFLATI,)
)
Plaintiff,)
)
vs.) Adversary No. 04-4150
)

DIRECT LOANS and)
GREAT LAKES EDUCATIONAL)
LOAN SERVICE,)
)
Defendants.)

**AFFIDAVIT OF
ROYLENE A. CHAMPEAUX**

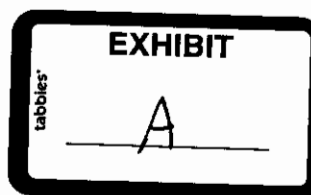
STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Roylene A. Champeaux, being first duly sworn, states as follows:

1. I am an adult over 18 years of age, competent, and have personal knowledge of the facts contained herein.

2. I am an Assistant United States Attorney and one of the attorneys for the Defendant United States Department of Education in the above action.

3. Plaintiff Sheri Lu Tiflati failed to serve the United States of America or the Attorney General of the United States with the Summons and Complaint.



4. The United States, therefore, seeks to vacate the Judgment entered against the United States Department of Education in this adversary proceeding.

5. As of this date, plaintiff has failed to properly serve the Summons and Complaint upon the United States.

FURTHER THIS AFFIANT SAYETH NOT.

Dated: October 7, 2004

Roylene A. Champeaux
ROYLENE A. CHAMPEAUX
Assistant United States Attorney

Subscribed and Sworn to Before Me

This 7th Day of October, 2004.
Karen M. Malikowski
NOTARY



UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re)	
)	
SHERI LU TIFLATI,)	Case No. BKY 04-40651
)	
Debtor.)	
SHERI LU TIFLATI,)	
)	
Plaintiff,)	
)	Adversary No. 04-4150
vs.)	
)	
DIRECT LOANS and)	
GREAT LAKES EDUCATIONAL)	
LOAN SERVICE,)	
)	
Defendants.)	

MEMORANDUM IN SUPPORT OF MOTION
OF THE UNITED STATES DEPARTMENT OF
EDUCATION (DIRECT LOANS) FOR RELIEF FROM JUDGMENT

FACTS

The facts are as set forth in verified motion.

ARGUMENT

Rule 9024 of the Federal Rules of Bankruptcy Procedure
provides that:

Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be

filed only within the time allowed by § 1144,
§ 1230, or § 1330.

Fed. R. Bankr. P. 9024.

Rule 60(b) of the Federal Rules of Civil Procedure provides that a party may obtain relief from a final order upon such terms as are just. Specifically, Rule 60(b) provides in relevant part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . (4) the judgment is void; . . . (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b). In considering a motion to set aside a judgment or order, the Court should apply Rule 60(b) equitably and liberally to achieve substantial justice. See Blois v. Friday, 612 F.2d 938, 940 (5th Cir. 1980).

The inadequacy of service of process combined with a lack of actual notice constitute sufficient facts to vacate a judgment or order. See In Re: DaShiell, 124 B.R. 242, 246-47 (Bankr. N.D. Ohio 1990). Here plaintiff failed to properly serve the United States Department of Education (hereinafter "ED") in accordance with Fed.R.Civ.P. 7004. See Affidavit of Roylene A. Champeaux.

Creditors have a right to adequate notice and the opportunity to be heard before a creditor's rights can be impaired. In re Hairopoulos, 118 F.3d 1240, 1244 (8th Cir. 1997).

When the United States has not been properly served with process in an adversary proceeding, the United States has not been made a party to the action and the Court is without jurisdiction to enter Judgment against the United States. In re Evans, 242 B.R. 407, 410 - 411 (Bankr. S.D. Ohio 1999). Here plaintiff clearly failed to properly serve ED with the Summons and Complaint. This being so, ED submits that the Court lacked jurisdiction over Defendant ED and the judgment entered against Defendant ED should be vacated.

CONCLUSION

For the foregoing reasons the United States Department of Education requests that the Court vacate the Judgment in favor of the plaintiff and against the United States Department of Education filed September 3, 2004 and for such other and further relief as may be just and equitable.

Dated: October 7, 2004

THOMAS B. HEFFELFINGER
United States Attorney

/e/ Roylene A. Champeaux
BY: ROYLENE A. CHAMPEAUX
Assistant United States Attorney
Attorney Reg. No. 154805
600 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5685

Attorneys for the United States
Department of Education

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:)
)
SHERI LU TIFLATI,) Bankruptcy No. 04-40651
)
Debtor.)
)
)

SHERI LU TIFLATI,)
)
Plaintiff,)
)
v.) Adversary No. 04-4150
)

DIRECT LOANS and)
GREAT LAKES EDUCATIONAL)
LOAN SERVICE,)
)
Defendants.)

UNSWORN

CERTIFICATE OF SERVICE

I, Carla R. Kohl, employed by the Office of the United States Attorney, with office address 600 United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415, declare that on October 7, 2004, I served copies of the foregoing Notice of Hearing and Motion of the United States Department of Education for Relief from Judgment, Affidavit of Roylene A. Champeaux, Memorandum in Support of Motion, and proposed Order on the entities named below by mailing to each of them a copy thereof by enclosing same in an envelope with first class mail postage prepaid to each entity named below at the address stated below for each entity:

Stephen R. Conroy, Esq.
261 E. Broadway
P.O. Box 999
Monticello, MN 55362

Dorraine A. Larison, Esq.
Trustee in Bankruptcy
1010 W. St. Germain, Rm. 600
St. Cloud, MN 56301

Amy Wenner, Esq.
Educational Credit Management
Corporation
101 East 5th St., Ste. 200
St. Paul, MN 55101

Office of the U. S. Trustee
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: October 7, 2004

Signed: /e/ Carla R. Kohl

CARLA R. KOHL

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re)	
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SHERI LU TIFLATI,)	Case No. BKY 04-40651
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Debtor.)	
SHERI LU TIFLATI,)	
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Plaintiff,)	
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vs.)	
)	
DIRECT LOANS and)	
GREAT LAKES EDUCATIONAL)	
LOAN SERVICE,)	
)	
Defendants.)	

ORDER

At Minneapolis, Minnesota, this ____ day of _____, 2004.

This matter came before the Court on the motion on behalf of the United States Department of Education (Direct Loans) for relief from the Court's Findings of Fact, Conclusions of Law, and Order for Judgment and Judgment and Decree against the United States Department of Education. Based upon the Motion of the United States Department of Education for Relief from Judgment, argument of counsel (if any), and all of the files and records herein,

NOW, THEREFORE, IT IS ORDERED:

1. That United States Department of Education's motion for relief from the Judgment is granted; and

2. The Judgment entered September 3, 2004 against the Defendant United States Department of Education is hereby vacated.

Dated:

NANCY C. DREHER
United States Bankruptcy Judge